(18)

No. 88-192

In The

Supreme Court of the United States

October Term, 1989

MCKESSON CORPORATION,

Petitioner,

v.

DIVISION OF ALCOHOLIC BEVERAGES and TOBACCO, DEPARTMENT OF BUSINESS REGULATION, and OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF OF CATERPILLAR INC.
AS AMICUS CURIAE
IN SUPPORT OF PETITIONER

Don S. Harnack
(Counsel of Record)
Richard A. Hanson
Gregory G. Palmer
McDermott, Will & Emery
111 West Monroe Street
Chicago, Illinois 60603
312/372-2000
Attorneys for Amicus Curiae

QUESTIONS PRESENTED

In this case, the Court has ordered the parties to brief the following issues:

1. When a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause must the State provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the State elect to provide only prospective relief?

2. May a State, consistently with the Due Process Clause of the 14th Amendment, remedy the effects of a tax found to discriminate against an interstate business in violation of the Dormant Commerce Clause by retroactively raising the taxes of those who benefited from the discrimination?

This brief *amicus curiae* addresses only the first question.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 88-192

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MCKESSON CORPORATION,

Petitioner,

v.

DIVISION OF ALCOHOLIC BEVERAGES and TOBACCO, DEPARTMENT OF BUSINESS REGULATION, and OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF OF CATERPILLAR INC. AS AMICUS CURIAE

INTEREST OF CATERPILLAR INC.

Caterpillar Inc. ("Caterpillar"), with the consent of the parties, submits this brief as *amicus curiae* in support of the position that a state must provide retrospective relief to a taxpayer who pays under protest a state tax which discriminates against interstate commerce. Caterpillar, a Delaware corporation, headquartered in Illinois, is the plaintiff in *Caterpillar Inc.* v. *State of Michigan, Department of Treasury*, Nos. 84-9664-CM and 87-11109-CM (Michigan Court of Claims). In that case, the Michigan Court of Claims determined that certain provisions of the Michigan Single Business Tax are unconstitutional because they discriminate against interstate

commerce. The court concluded that Caterpillar would be granted prospective relief only. An appeal has been filed with the Michigan Court of Appeals. A decision in this case is likely to affect Caterpillar's Michigan litigation.

SUMMARY OF ARGUMENT

This Court has consistently held that the Commerce Clause prohibits state taxes which discriminate against interstate commerce. This prohibition protects two separate but related interests: the power of Congress to regulate commerce and the right of interstate businesses to equal tax treatment with local businesses.

When a state tax discriminates against interstate commerce, the proper remedy is to retroactively restore the equality required by the Commerce Clause. This is the remedy which the Court has approved in cases involving state taxes which violate the Equal Protection Clause.

Permitting a state to provide only prospective relief does not protect the rights of interstate businesses to equality of taxation. The only counterweight to the provincial interests and local political power which are often the source of discriminatory taxation are the courts of the fifty states and the United States Supreme Court.

I.

THE COMMERCE CLAUSE PROHIBITION OF DISCRIMINATORY TAXATION

At least since *Welton* v. *Missouri*, 91 U.S. 275 (1876), this Court has consistently held that the Commerce Clause prohibits state taxes which discriminate against interstate commerce. As this Court stated in *Guy* v. *Baltimore*, 100 U.S. 434 (1879):

> [I]t must be regarded as settled that no State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory.

100 U.S. at 439. This doctrine was cited with approval most recently in *New Energy Company of Indiana* v. *Limbach*, 486 U.S. 269, 108 S.Ct. 1803 (1988). Justice Scalia stated:

> It has long been accepted that the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce. This "negative" aspect of the Commerce Clause prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.

108 S.Ct. at 1807 (citations omitted). It is, of course, this line of authority which the Florida Supreme Court used to strike down the tax at issue here.

This line of authority was also followed in striking down the provisions of the Michigan Single Business Tax at issue in *Caterpillar Inc.* v. *State of Michigan, Department of Treasury*. The decision acknowledges that the discriminatory effect of the Michigan law had been consistently ruled unconstitutional by this Court. Nonetheless, the court granted only prospective relief. The court justified this choice by claiming that the United States Supreme Court decisions had never invalidated an unconstitutional tax deduction, only unconstitutional tax credits. The court did not explain the significance of this distinction. There is none. Tax deductions and tax

credits operate in the same manner, to reduce the tax which would otherwise be due. A copy of the Court of Claims decision is attached as Exhibit A.

II.

THE PROHIBITION AGAINST DISCRIMINATORY TAXATION VINDICATES BOTH THE NATIONAL INTEREST AND THAT OF THE AFFECTED TAXPAYERS

The Commerce Clause prohibition against discriminatory taxes is frequently explained as necessary to create "an area of trade free from interference by the states. . . . " *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, at 328 (1977). However, it was recognized as early as *Guy* v. *Baltimore*, that the Commerce Clause prohibition against discriminatory taxation serves two purposes. Justice Harlan explained the prohibition against discriminatory taxation as follows:

> If this were not so [prohibition against discriminatory taxation], it is easy to perceive how the power of Congress to regulate commerce with foreign nations and among the several States could be practically annulled, *and the equality of commercial privileges secured by the Federal Constitution to citizens of the several States be materially abridged and impaired.*

100 U.S. at 439-440 (emphasis added). In sum, the Commerce Clause protects both Congress' right to regulate interstate commerce and interstate business' right to commercial privileges equal to those granted an intrastate business. This point was made again in *Best & Company, Inc.* v. *Maxwell*, 311 U.S. 454 (1940):

> *The freedom of commerce which allows the merchants of each state a regional or national market for their goods* is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language.

311 U.S. at 457 (emphasis added). In *Nippert* v. *Richmond*, 327 U.S. 416 (1946), Justice Rutledge struck down a local tax on solicitors as discriminating against interstate commerce. He again acknowledged the right of interstate commerce to be free of discriminatory taxation and the personal nature of that right:

> The drummer is a figure representative of a by-gone day. But his modern prototype persists under more euphonious appellations. So endure the basic reasons which brought about *his protection* from the kind of local favoritism the facts of this case typify.

327 U.S. at 435 (emphasis added). *Guy* v. *Baltimore*, *Best & Company, Inc.* and *Nippert* establish what ought to be a self-evident proposition. The national interest in free trade and the right of each individual participant in interstate commerce to equal tax treatment are intertwined and are both protected by the Commerce Clause.

III.

THE PROPER REMEDY FOR DISCRIMINATORY STATE TAXATION IS THE RESTORATION OF EQUALITY

While this Court has not addressed the question of the appropriate remedy for discriminatory taxation under the Commerce Clause, the Court has addressed the question of remedy when a tax is stricken under the Equal Protection Clause. That remedy is a restoration of equal taxation.

In *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931), the Court directly addressed the remedy appropriate

to a taxpayer suffering discriminatory taxation. Its teaching is equally applicable here. Justice Brandeis, speaking for the Court, stated:

> The petitioners' rights were violated, and the cause of actions arose, when taxes at the lower rate were collected from their competitors. It may be assumed that all ground for a claim for refund would have fallen if the State, promptly upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored competitors. By such collection the petitioners' grievances would have been redressed; for these are not primarily overassessment. The right invoked is that of equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the other should have paid. Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative.
>
> The petitioners are entitled to obtain in these suits refund of the excess taxes exacted from them.

284 U.S. at 247 (citations omitted). The same point was made by Justice Douglas in *Hillsborough* v. *Cromwell*, 326 U.S. 620 (1946):

> The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right of equal treatment. He may not complain if equality is achieved by increasing the same taxes of other members of the class to the level of his own. The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of the other members of the class.

326 U.S. at 623. This doctrine was most recently approved in *Allegheny Pittsburgh Coal Company* v. *County Commissioner of Webster County, West Virginia*, 109 S.Ct. 633 (1989). There, Chief Justice Rehnquist, speaking for a unanimous court, cited both *Hillsborough* and *Iowa-Des Moines National Bank* with approval in connection with directions for remand and relief of discriminatory taxation.

The discrimination practiced in *Iowa-Des Moines National Bank*, *Hillsborough* and *Allegheny Pittsburgh Coal Company* is neither different in kind nor degree than that which has been condemned in Commerce Clause cases.[1] The taxpayer against whom the discrimination is practiced is entitled to relief in the form of equality. This requires retroactive adjustment of the tax burdens to restore equal treatment.

IV.

PROSPECTIVE RELIEF DOES NOT REMEDY THE COMMERCE CLAUSE VIOLATION

In its Order, this Court limited reargument to the proper remedy where a tax violates established Commerce Clause principles. In such circumstances, prospective relief from discrimination does not adequately address and remedy the violation.

---

[1] *See, e.g.*, the concurring opinion of Justice Brennan in *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522 (1959), at 532-533. Cases alleging discriminatory taxes often invoke both the Commerce Clause and Equal Protection Clause as grounds for relief. *See, e.g.*, *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388 (1984).

It has been suggested in certain recent state court decisions that prospective elimination of the offending provisions of a state tax statute is sufficient to vindicate the purpose of the Commerce Clause. For example, in *National Can Corporation* v. *Washington Dept. of Revenue*, 109 Wash.2d 878, 749 P.2d 1286, *cert. denied and appeal dismissed*, 108 S.Ct. 2030 (1988), the Washington Supreme Court determined that any change in Washington law could be prospective and thereby denied relief to the affected taxpayers. In discussing whether a prospective remedy would further the purpose of the Commerce Clause (the second part of the *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971) analysis), the court stated:

> The central purpose of the commerce clause is to create an area of free trade among states . . . .
>
> It is difficult to understand how retroactive application would encourage free trade among the states since whatever chill was imposed on interstate trade is in the past and the Legislature has enacted law to attempt to comport with the new commerce clause taxation laws announced in *Tyler*.

109 Wash.2d at 888-889, 749 P.2d at 1291 (citations omitted). The Arkansas Supreme Court cited this language with approval in *American Trucking Association* v. *Gray*, 295 Ark. 43, 746 S.W.2d 377 (1988), when it granted only prospective application of the decision in *American Trucking Association* v. *Scheiner*, 483 U.S. 266 (1987). Both of these cases overlook the taxpayer who has suffered harm as a result of discriminatory taxes and who has individual rights which are not protected by prospective application.

The attempt by a state to retain an unconstitutional tax on the basis that the offending provision has been eliminated is

not a recent development. In *Montana National Bank of Billings* v. *Yellowstone County of Montana*, 276 U.S. 499 (1928), the state attempted just that. In response, this Court stated:

> It is true that the state supreme court in the present case expressly repudiated the construction theretofore put by it upon the state statutes in the *Rogers* case, *supra*, and, as already stated, adopted one to the exact contrary. But that does not cure the mischief which had been done under the earlier construction. That construction had already been acted upon by the taxing officials and the application thus made of the statutes had given rise to the present cause of action and an undoubted right to recover thereon. The statutes, as thus construed and applied to the concrete facts of the case, were invalid; and this is enough to justify the challenge here under consideration. *Plaintiff in error cannot be deprived of its legal right to recover the amount of the tax unlawfully exacted of it by the later decision which, while repudiating the construction under which the unlawful exaction was made, leaves the monies thus exacted in the public treasury.*
>
> But it is said that the taxing officers of the county, in view of the later decision, now have the power to tax the shares of state banks and thus bring about an equality. As to this it is unnecessary to say more than that it nowhere appears that these officers, if they possess the power, have undertaken to exercise it or that they have any intention of ever doing so. It will be soon enough to invite consideration of this purely speculative suggestion when, if ever, the taxing officials shall have put it into practical effect.

276 U.S. at 504-505 (emphasis added and citations omitted). More recently, in *Texas Monthly, Inc.* v. *Bullock*, 109 S.Ct. 890 (1989), the State of Texas challenged the standing of the taxpayer to claim a remedy for taxes found to violate the First

Amendment by pointing out that the law had been changed to eliminate the unconstitutional provision. Justice Brennan responded:

> Texas cannot strip appellant of standing by changing the law after taking its money.

109 S.Ct. at 896. While Justice Brennan's statement related to appellant's standing, it accurately describes the effect of permitting states to grant only prospective relief in cases involving payments under protest.

The payment of the tax under protest is generally required before the taxpayer can challenge an unconstitutional tax.[2] The availability of only prospective relief would effectively make the tax payment a non-recoverable cost of access to the courts. To require the taxpayer to pay the tax as a condition of challenging the law and deny recovery violates long-standing notions of fairness under the Due Process Clause. *Ward* v. *Love County*, 253 U.S. 17 (1920); *Carpenter* v. *Shaw*, 280 U.S. 363 (1930). The states should not be permitted to force a payment of tax as a condition of challenging the law and then keep the tax when the taxpayer's challenge is upheld.

One final consideration supports a requirement of retrospective relief in cases involving taxes discriminating against interstate commerce. The taxpayers who bear the burden of those taxes tend not to have the kind of in-state presence which allows a realistic opportunity to affect the political process and thereby discourage discriminatory taxes. This lack of a political voice was acknowledged by Justice Stone in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33

[2] For example, the taxpayers in this case and *American Trucking Association* v. *Gray*, each requested an escrow of protested taxes. These requests were denied. Further, taxpayers are barred from obtaining injunctive relief in the federal courts. 28 U.S.C.A. § 1341.

(1940). There, while upholding a New York tax on the sale of property shipped in interstate commerce, the Court acknowledged the absence of these normal political restraints. The Court stated:

> Lying back of these decisions is the recognized danger that, to the extent the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state.

309 U.S. at 46 (n. 2). Justice Rutledge made a similar point in *Nippert* v. *Richmond*, when he said regarding discriminatory taxation:

> Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against.

327 U.S. at 434. In the absence of realistic access to the political process, the state courts and this Court are the only forums available to protect the right of interstate taxpayers facing discriminatory taxation. The state courts in particular must shoulder a heavy responsibility to assure that their decisions will appropriately discourage further cases of discriminatory taxation. This goal is best achieved by mandating retroactive relief.

The present case presents an object lesson in legislative stonewalling when the courts do not require retrospective relief. Caterpillar and other interstate taxpayers have a well-grounded fear that the experience in Florida will become more common if the discipline of retrospective relief from discriminatory taxation is removed.

CONCLUSION

For the foregoing reasons, Caterpillar Inc. respectfully urges the Court to require a state to grant retrospective relief where a state tax has been imposed and collected in violation of the Commerce Clause prohibition against discriminatory taxation.

Respectfully submitted,

DON S. HARNACK
(Counsel of Record)
RICHARD A. HANSON
GREGORY G. PALMER
MCDERMOTT, WILL & EMERY
111 West Monroe Street
Chicago, Illinois 60603
312/372-2000
Attorneys for Amicus Curiae

APPENDIX A

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

CATERPILLAR INC., formerly CATERPILLAR TRACTOR CO., Plaintiff,	File No. 84-9664-CM
v	File No. 87-11109-CM
STATE OF MICHIGAN, DEPARTMENT OF TREASURY, REVENUE DIVISION, Defendant.	OPINION AND ORDER

This action is brought by Plaintiff, Caterpillar, Inc., for the refund of Michigan Single Business Taxes in the amount of \$733,553.00 plus interest for the years 1981-84. The parties have filed a joint motion for summary disposition on the issue of whether the Michigan Single Business Tax Act (MCL 208.1 *et seq.*; MSA 7.558(1) *et seq.*) is unconstitutional.

This Court holds that the Capital Acquisition Deduction (CAD), of the Michigan Single Business Tax Act (MCL 208.23; MSA 7.558 (23), is unconstitutional on grounds that it violates the Commerce Clause (United States Constitution, Article 1, Section 8, Clause 3). Further, MCL 208.23; MSA 7.558(23) must be severed from the Single Business Tax Act and Plaintiff shall be granted prospective relief only.

Plaintiff is a foreign corporation headquartered in Peoria, Illinois and incorporated in Delaware. In 1984, Plaintiff had over 61,000 employees worldwide and sales exceeding 6.6 billion dollars. Moreover, Plaintiff paid out over 2.4 billion dollars in wages, salaries and employee benefits in 1984.

The gravamen of Plaintiff's complaint is that MCL 208.23; MSA 7.558(23) discriminates against businesses with large

out of state operations. MCL 208.23; MSA 7.558(23) was amended in 1981 and essentially provides the following formula when calculating the deduction:

$$\frac{\dfrac{\text{Michigan Personal Property}}{\text{All Personal Property}} + \dfrac{\text{Michigan Payroll}}{\text{All Payroll}}}{2}$$

An example of how MCL 208.23; MSA 7.558(23) discriminates against out of state corporations is apparent in the following hypothetical:

Corporation A has all of its property and payroll in Michigan and total capital acquisition purchases of $100,000. If corporation A had Michigan personal property worth 5 million dollars and a Michigan payroll of 5 million, its CAD would be:

$$\$100{,}000 \quad \text{x} \quad \frac{\dfrac{5{,}000{,}000}{5{,}000{,}000} + \dfrac{5{,}000{,}000}{5{,}000{,}000}}{2} \quad = \quad \$100{,}000$$

Contrastly, Corporation B has only a small portion of its personal property and payroll in Michigan yet makes identical capital acquisition purchases of $100,000. If Corporation B had Michigan personal property worth 5 million dollars, all personal property worth 100 million dollars and a Michigan payroll of 5 million dollars, a total payroll of 100 million dollars, its CAD on identical capital purchases would be:

$$\$100{,}000 \quad \text{x} \quad \frac{\dfrac{5{,}000{,}000}{100{,}000{,}000} + \dfrac{5{,}000{,}000}{\$100{,}000{,}000}}{2} \quad = \quad \$5{,}000$$

Although Corporation A and B made identical capital acquisition purchases in the above hypothetical, Corporation B's taxable income would be $95,000 higher than Corporation

A's because the CAD operates to favor businesses with all or most of their operations based in Michigan. For Plaintiff in the instant case, MCL 208.23; MSA 7.558(23) has cost it $733,553 in taxes which it would not have incurred had Plaintiff based all its property and payroll in Michigan.

The discriminatory effect of MCL 208.23; MSA 7.558(23) has been consistently ruled unconstitutional by the U.S. Supreme Court on grounds that it violates the commerce clause. In *Halliburton Oil Well Cementing Co.* v *Reily*, 373 U.S. 64 (1962), *reh'g denied*, 374 U.S. 858 (1963), the U.S. Supreme Court struck down a Louisiana use tax exemption which had the effect of imposing a lower use tax on property assembled in Louisiana as compared to property assembled out of state and brought into Louisiana. The Court found this exemption to be a clear violation of the Commerce Clause because it discriminated against the out-of-state manufacturer as compared to the in-state manufacturer when each engaged in the same transaction — use of identical property in the state. The same result ensues here. A Michigan company receives a greater CAD than Plaintiff when each engages in the same transaction — purchase and use of an identical piece of property in Michigan.

The Court in *Halliburton* also noted that the result of the Louisiana tax would be to provide an incentive to move assembly work into Louisiana. It then went on to state:

> Disapproval of such a result is implicit in all cases dealing with tax discrimination, since a tax which is 'discriminatory in favor of the local merchant, '*Nippert* v *Richmond*, *supra*, also encourages an out of state operator to become a resident in order to compete on equal terms. *Halliburton* 373 U.S. at 72.

Such an effect would "invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce clause." *Id.* at 72-73.

Halliburton is only one of a long line of cases holding it impermissible to discriminate against out-of-state businesses in favor of local interests. Most recently the U.S. Supreme Court decided *American Trucking Ass'n, Inc.* v *Scheiner*, 55 USLW 4988 (1987). In striking down a Pennsylvania road tax which bore less heavily on Pennsylvania based companies than out-of-state companies the Court summarized its prior decisions as follows:

> Under our consistent course of decisions in recent years a state tax that favors in-state business over out-of-state business for no other reason than the location of its business is prohibited by the Commerce Clause. *Id.* at 4993.

The greater CAD is allowed to Michigan based companies solely because of the location of their business. Under *Halliburton* and *American Trucking*, such preferential treatment is unconstitutional.

It is no defense to the unconstitutionality of the CAD to argue that while the deduction allowed a Michigan business on the purchase of property is greater than that allowed an out of state business, the Michigan taxpayer will also be subject to tax on a greater proportion of the depreciation generated by that property. The gist of this defense is that over the period of use of the property, the discrimination inherent in the CAD will be minimized.

Regarding the consideration of retroactive relief, in the last several years numerous tax cases have granted prospective relief only and in which refunds were denied. *Ashland Oil, Inc.* v *Rose*, 305 SE2d 531 (1986); *First of McAlester Corp.* v *Okla Tax Comm*, 709 P2d 1026 (Okla, 1985); *Salorio* v *Glaser*, 461

A2d 1100; 93 NJ 447 (1983); *Midland Bank & Trust Co.* v *Olsen*, 717 SW2d 580 (1986); *Private Truck Council of America, Inc*, v *Maine Secretary of State*, 503 A2d 214 (1986); *Private Truck Council of America, Inc* v *New Hampshire*, 128 NH 466; 517 A2d 1150 (1986); *American Trucking Associations, Inc* v *Vermont Commissioner of Motor Vehicles*, 146 VT 579; 508 A2d 405 (1986); *Continental Railways, Inc* v *Director, Division of Motor Vehicles*, 102 NJ 526; 509 A2d (1986); *Metropolitan Life Ins. Co.* v *Comm'r of Dept. of Ins*, 373 NW2d 399 (ND, 1985); *National Can Corp* v *Washington Department of Revenue*, and *Tyler Pipe Industries* v *Washington Department of Revenue*, 749 P2d 1286 (1988); cert den ___ US ___; ___ S Ct ___; 100 L Ed 2d 6154 (1988); *American Trucking Associations* v *Gray*, 746 SW2d 377 (1988); *Fla Division of Alcoholic Beverages and Tobacco, et al* v *McKesson Corp, et al*, 524 So2d 1000 (Fla, 1988); *National Distributing Co, Inc, et al* v *Fla Office of the Comptroller*, 523 So2d 156 (1988).

In Michigan the courts have also given prospective application to tax decisions. In *Washtenaw County* v *State Tax Comm*, 422 Mich 346; 373 NW2d 697 (1985), the Court gave purely prospective application to its decision requiring that effects of "creative financing" be considered in valuation of real property used for equalization purposes. The court noted that the local governments had already collected and spent the tax levies at issue and the administrative burden of re-evaluation would be considerable.

The Court of Appeals in a recent decision gave only prospective application to its decision concerning the constitutionality of the insurance premium tax. In the case of *Penn Mutual Life Insurance Co. et al* v *Dept of Licensing et al*, 162

Mich App 123; 412 NW2d 668 (1987), the Court of Appeals held that the insurance premium tax was unconstitutional. However, the Court gave the decision only prospective effect:

> . . . Refunds of the magnitude involved here would place undue hardship on the people of this state. Furthermore, the state has justifiably relied on the constitutionality of this tax and balanced the state budget accordingly. 162 Mich App at 134.

In *Chevron Oil Co.,* v *Huson*, 404 U.S. 97 (1971), the United States Supreme Court established the controlling tests for determining whether a judicial decision should apply retroactively or prospectively. The Supreme Court stated:

> [T]he decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . 404 U.S. at 106 [citations omitted].

The issue of the constitutionality of MCL 208.23; MSA 7.558 (23) is one of first impression. The U.S. Supreme Court has not invalidated a deduction provision as contrasted with an unconstitutional credit provision. *Westinghouse Electric Corp.* v *Tully*, 466 U.S. 388 (1984). Moreover, the issue of whether a tax deduction discriminates against out-of-state Corporations and therefore violates the Commerce Clause of the U.S. Constitution, Article 8, Section 3, presents an entirely novel question of law and is thus an issue of first impression.

In summary, MCL 208.23; MSA 7.558(23) is held to be unconstitutional as it violates the Commerce Clause of the U.S. Constitution. Further MCL 208.23; MSA 7.558(23) must be severed from the Single Business Tax Act and Plaintiff shall be awarded prospective relief only.

Date: 7-13-89

/s/ Thomas L. Brown

Thomas L. Brown,
Circuit Judge